

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

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4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 v.

7 KELLY CARN,

8 Defendant.

Case No. 2:13-cr-00346-APG-GWF

**ORDER ACCEPTING MAGISTRATE  
JUDGE'S REPORT &  
RECOMMENDATION ON MOTION FOR  
RETURN OF PROPERTY**

(ECF Nos. 109, 143)

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10 Defendant Kelly Carn filed a motion for return of seized property. ECF No. 109. Magistrate  
11 Judge Foley entered his Report & Recommendation recommending that the motion be denied. ECF  
12 No. 143. Mr. Carn filed an Objection to the Report & Recommendation (ECF No. 144) and the  
13 Government filed a Response (ECF No. 145). Pursuant to Local Rule IB 3-2(b), I have conducted  
14 a *de novo* review of the motion and related papers. Judge Foley properly analyzed the facts and  
15 law applicable to this situation. I accept his recommendation and adopt his reasoning. Below I  
16 address the new arguments Carn raised in his Objection.

17 In his Objection, Carn argues that the statute Judge Foley relied upon in deeming these  
18 firearms to be contraband (28 U.S.C. § 5861) is unconstitutionally vague. Carn relies on a holding  
19 from the Southern District of Illinois that this statute allows for “completely arbitrary enforcement.”  
20 *United States v. Vest*, 448 F.Supp.2d 1002 (S.D. Ill. 2006). But that court found the statute  
21 “unconstitutionally vague as applied to . . . a police officer/lead rifle instructor,” not as to all  
22 citizens. *Id.* at 1014. The court relied on the fact the officer was required to use the subject firearm  
23 in his training of other officers, the fact that the weapons were registered to the police officer’s  
24 employer (the Illinois State Police), and “the purpose of the Firearms Act, [which] is to go after  
25 crime weapons and not law enforcement weapons . . . .” *Id.* The Sixth Circuit later held that *Vest*,  
26 as with all “as applied” constitutional challenges, should be interpreted in light of its specific facts,  
27 i.e., as applied to a law enforcement officer who purportedly bought the weapon for work purposes.  
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1 *United States v. Theunick*, 651 F.3d 578, 585-87 (6th Cir. 2011) (distinguishing *Vest* and affirming  
2 conviction because, in part, the defendants “appear to have possessed the weapons exclusively in a  
3 personal capacity, without any legitimate law enforcement purpose”). Here, Carn possessed the  
4 weapons for commercial or personal purposes, with no connection to law enforcement use. Carn  
5 has not shown that the statute is a “broad invitation to subjective or discriminatory enforcement.”  
6 *Grayned v. City of Rockford*, 408 U.S. 104, 113 (1972). “As always, enforcement requires the  
7 exercise of some degree of police judgment, but, as confined, that degree of judgment here is  
8 permissible.” *Id.* at 114. I reject Carn’s argument that 28 U.S.C. § 5861 is unconstitutionally vague  
9 as applied to him.

10 In his Objection, Carn also requests the opportunity to conduct discovery regarding the  
11 Government agents’ alleged affirmative misconduct, to prove equitable estoppel against the  
12 Government. ECF No. 144 at 8. However, Carn has not shown by affidavit the specific facts he  
13 hopes to elicit from further discovery and that those facts exist. *Family Home and Fin. Ctr., Inc. v.*  
14 *Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). Carn alleges generally that ATF  
15 agents reviewed his inventory over the years and did not alert him to any problems with the  
16 weapons. But Carn could not blindly rely on the ATF agents for a blessing of his misdeeds. As a  
17 federal firearms dealer, Carn was required to be familiar with, and comply with, all federal, state,  
18 and local laws. *United States v. Kish*, 424 F. Appx. 398, 399 n.2 (6th Cir. 2011). Any reliance on  
19 the ATF’s failure to uncover his violations of the National Firearms Act would not be reasonable.

20 And Carn has had many months in which to request discovery. In his May 8, 2017 reply in  
21 support of his motion, Carn discussed the alleged affirmative misconduct of the ATF agents. ECF  
22 No. 128 at 15. Yet Carn did not request discovery until after Magistrate Judge Foley denied his  
23 motion, seven months after the reply was filed and nearly one year after the original motion was  
24 filed. The failure to diligently pursue discovery is grounds to refuse a request for additional  
25 discovery. *Nevada Dep’t of Corrs. v. Greene*, 648 F.3d 1014, 1019-20 (9th Cir. 2011). Therefore,  
26 I deny Carn’s request for discovery on this issue.

1 IT IS HEREBY ORDERED that Magistrate Judge Foley's Report & Recommendation  
2 **(ECF No. 143) is accepted.** Mr. Carn's motion for return of seized property **(ECF No. 109) is**  
3 **denied.**

4 DATED this 20th day of March, 2018.



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6 ANDREW P. GORDON  
7 UNITED STATES DISTRICT JUDGE  
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